523:51 Hamell

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of: ROBERT D. BARNES (Chapter 7 Case 90-40257) Debtor LYNN BARNES Plaintiff v. ROBERT BARNES Defendant	Adversary Proceeding Number 90-4066

FILED
at 9 O'clock & 28 min. A M
Date 9/12/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia MCB

MEMORANDUM AND ORDER

Plaintiff brings this action seeking a determination that certain obligations imposed on Debtor Robert D. Barnes are non-dischargeable pursuant to 11 U.S.C. Section 523(a)(5).

FINDINGS OF FACT

Plaintiff (hereinafter "Wife") and Debtor (hereinafter "Husband") were married in 1983. Husband was employed by NASA and later by Gulfstream in Savannah, Georgia, and earned approximately $50,000.00 per year plus Army Retirement of $1,000.00 per month. The parties were divorced by Judgment and Decree dated July 13, 1990. At the time of the divorce the Wife was not working, but went to work subsequently netting approximately $200.00 per week. Husband has left the Savannah area to take employment similar to employment he was engaged in in Savannah as of the time of the divorce.

The divorce case was tried before the Honorable James W. Head, Judge, Superior Court of Chatham County, Georgia, and as a result of the evidence produced at that time Judge Head awarded as alimony the sum of $2,300.00 per month commencing July 15, 1990. Thereafter, Judge Head provided for an equitable division of the property of the parties by awarding the marital residence at 6 Barrington Circle to the Wife as well as the residence located at 11 Ponderosa Drive which she owned at the time of her marriage to the husband. The obligation for paying first and second mortgages

which existed on both parcels of real estate was imposed upon the Wife and she was also awarded the rental income on the Ponderosa Drive property in the amount of $525.00 per month.

The $2,300.00 per month payment was explicitly determined by the Superior Court to be for the "support and maintenance of the wife." During the time of the marriage the Husband had induced the Wife to refinance the home she already owned and to place a second mortgage on it for the purpose of making a down payment on a much more expensive home in which they lived. Wife had also inherited approximately $60,000.00 in 1985, during the marriage. Husband used some of the inheritance to invest in stocks and certificates of deposit. The stocks proved to be unwise investments and are now worthless and the certificates of deposit were pledged as additional collateral for the loans extended secured by the parties' marital residence.

Husband's counsel argued that the total of first and second mortgage payments imposed upon the Wife was almost exactly equal to the sum of $2,300.00 awarded as "alimony" by Judge Head and therefore argued that this Court should construe that judgment as creating a dischargeable obligation involving only a division of

property as opposed to a non-dischargeable alimony obligation of the Husband. Wife's counsel argues to the contrary that there was a substantial disparity in the income and earning ability of the parties at the time of the divorce, that the Wife was totally without any means of support, absent the award of alimony, and that that sum of money should be regarded as non-dischargeable under bankruptcy law.

CONCLUSIONS OF LAW

11 U. S. C. Section 523(a)(5)[1] creates an exception from

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[1] 11 U.S.C. Section 523(a)(5) provides that:

> (a) A discharge . . . does not discharge an individual debtor from any debt--
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or
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> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually

discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . ", but only if the debt is "actually in the nature of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).[2] The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law". Harrell, 754 F.2d at 905 (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U. S. Code Cong.& Admin. News 5787, 6319). To be held non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904. A determination is made by examining the facts and circumstances existing at the time the obligation was created, not at the time of

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in the nature of alimony, maintenance, or support;

[2] In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S. D. Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S. D. Ga. 1983) (Edenfield, J.).

the bankruptcy petition. Harrell, 754 F.2d at 906.[3]; Accord Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd on other grounds, 723 F.2d 737 (9th Cir. 1984). Contra, Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109 Pauley v. Spong, 661 F.2d 6, 9 (2nd Cir. 1981). The Harrell court stated:

> The language used by Congress in §523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support". The statutory language suggests a simple

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[3] In rejecting the analysis in In re Warner, 5 B.R. 434 (Bankr. D. Utah, 1980), Harrell overrules Bedingfield only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding". Bedingfield 42 B.R. at 646. The fact that the circumstances of the parties may have changed from the time the obligation was created is not relevant to the inquiry which the bankruptcy court must undertake in a §523(a)(5) action. Harrell, 754 F.2d at 907. In all other respects, Bedingfield remains controlling authority in this jurisdiction.

> inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change. 754 F.2d at 906 (emphasis original).

In analyzing this portion of the Harrell opinion, it is clear that only "a simple inquiry as to whether the obligation can legitimately be characterized as support" is needed. While the court did find that bankruptcy laws, not state law is controlling, it did not explicitly fashion guidelines or otherwise set forth factors to be used in resolving the required "simple inquiry".[4] See Bedingfield, 42 B.R. at 645-46 ["While it is clear that Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony or support, it does not necessarily follow that state law must be ignored completely . . . . The point is that bankruptcy courts are not

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[4]. Although the court did not set forth a laundry list of factors which the bankruptcy court should consider, it did state that a "precise inquiry into financial circumstances to determine precise levels of need or support" is not required. Furthermore, the court rejected the reasoning of those courts which conclude that an ongoing assessment of need is required. 754 F.2d at 906. These limitations on the §523(a)(5) inquiry reflect the court's concern for considerations of comity. 754 F.2d at 907.

bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself." (Citations omitted.)]; Accord Spong, 661 F.2d at 9. In addition to the state law factors used in determining alimony, the federal courts have employed a number of factors to determine whether the debt is actually in the nature of alimony, maintenance, or support. These factors include:

1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "[T]he presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. [citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).]

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient

spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4) The characterization of the obligation applied in state court is entitled to the greater deference where it is based upon findings of fact and conclusions of law stemming from actual litigation of a divorce rather than from judicial approval of an uncontested divorce settlement. In re Hall, 40 B.R. 204, 206 (Bankr. M.D.Fla. 1984).

5) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into account all the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Calhoun, 715 F.2d at

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As applied to the facts in this case I conclude that wife is entitled to prevail for several reasons. First, Judge Head explicitly found the sum of $2,300.00 per month to be necessary for wife's support and maintenance. While such a finding is not conclusive on this Court it is very persuasive of the fact that such a sum was "actually" in the nature of support and was not a disguised property settlement. Secondly, there was a wide disparity of income between husband, earning over $60,000.00 annually at the time and wife who was not employed and whose skills qualify her even now to earn only $200.00 per week. Finally, the award is not "manifestly unreasonable" under traditional concepts of support. The award represents a substantial proportion of husband's earning capacity. However, he had induced wife to extend herself financially and to mortgage her separately owned real estate, and pledge her inheritance during the time of the marriage. Judge Head obviously concluded that wife could not and should not be forced to bear these immense financial burdens without substantial assistance from husband. He concluded that such payments were in fact necessary for wife's maintenance and support and this Court will not presume to suggest that it is better able

to determine what is a reasonable level of support under state law than Judge Head. This is not a case where the parties settled a divorce case and employed nomenclature to establish alimony and property settlement awards that were negotiated for tax or other reasons. Rather, the case was fully tried in an adversary process and it would be extraordinary to conclude that the award to wife was not "actually in the nature of support."

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that husband's obligations to wife for the payment of $2,300.00 per month are declared non-dischargeable in these proceedings.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 6th day of ~~August~~ Sept, 1990.

BK 95
(Rev. 8/83)

FILED
at 9 O'clock & 28 min A M
Date 9/12/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

United States Bankruptcy Court

For the SOUTHERN District of GEORGIA

LYNN BARNES

Plaintiff

v.

ROBERT BARNES

Defendant

Case No. 90-40257

Adversary Proceeding No. 90-4066

JUDGMENT

☐ This proceeding having come on tor trial or hearing before the court, the Honorable Lamar W. Davis, Jr., United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

[OR]

☐ This proceeding having come on for trial before the court and a jury, the Honorable Lamar W. Davis, Jr., United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[OR]

☐ The issues of this proceeding having been duly considered by the Honorable Lamar W. Davis, Jr., United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED:

That the obligations of Defendant, ROBERT BARNES, to the Plaintiff, LYNN BARNES, for the payment of Two Thousand Three Hundred Dollars and 00/100 Cents ($2,300.00), per month are non-dischargeable in these proceedings.

UNITED STATES BANKRUPTCY COURT ★ SEAL

[Seal of the U.S. Bankruptcy Court]

Date of issuance: September 6, 1990

MARY C. BECTON
Clerk of Bankruptcy Court

By: Patsy C. Burkhalter
Deputy Clerk